IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.724 OF 1999
WITH
CRIMINAL APPEAL NO. 700 OF 1999
WITH
CRIMINAL APPEAL NO. 584 OF 1999
WITH
CRIMINAL APPEAL NO. 725 OF 1999.

CRIMINAL APPEAL NO.724 OF 1999

1. Kishor Dhondu Kelkar,
   R/o Gupta chawl,
   Gopal Nagar Paisar,
   Kandiwali, Bombay.

2. Prakash @ Pappu Govind Pawar,
   R/o Anand Nagar,
   Kamble Vasahat R.No. 85/46.
   Worli Jijamata Nagar,
   Worli, Bombay - 400 018 .. Appellants (orig.Accused Nos. 1 and 6)

V/s.

The State of Maharashtra ..Respondent.

CRIMINAL APPEAL NO. 700 OF 1999

1. Santosh Chandrakant Dhakane,
   R/o Room No. 108, Dr. E. Mozes
   Road, Anand Nagar, Kamble
   Vasant, Worli, Mumbai
   At present at Central
   Prison Nasik. .. Appellant (orig.Accused No.2.)

V/s

The State of Maharashtra ..Respondent.

CRIMINAL APEAL NO.584 OF 1999

Shri Surayakant @ Appa Dashrath .. Appellant
R/o Room No. 112,5/11, Jijamata (orig. accused
Nagar,Worli, Mumbai -400 018. No.3).
V/s
The State of Maharashtra. ..Respondent.

CRIMINAL APPEAL NO. 725 OF 1999

1. Ajay @ Ajju Gopal Kanojia,
R/o B-95, Jijamata Nagar,
Dr. E. Moses Road,
Bombay-400 018

2. Sunil Suresh Jadhav
R/o R.No.91 (52) Anand Nagar,
Worli Bombay- 400018. ..Appellants.
(Orig.Accused
Nos 4 and 7)
V/s
The State of Maharashtra ..Respondent.

Shri Ganesh Gole for the appellants in all appeals.

Mrs. P.H. Kantharia, A.P.P.for the State in all appeals.

CORAM : V.G.PALSHIKAR &
ANOOP V.MOHTA, JJ.

DATE : 28TH OCTOBER, 2004.

JUDGMENT (**PER ANOOP V. MOHTA, J.**)

. These are four appeals filed by appellants-accused Nos. 1,2,3,4,6 and 7 and thereby the challenged the order passed by the Additional Sessions Judge, Greater Bombay, whereby, the appellants have been convicted under Sections 143,144,146,149 and 302 of

Indian Penal Code. The maximum punishment awarded has been rigorous imprisonment for life, apart from respective sentencing and fine and other related orders.

2. The learned Sessions Judge has held that the deceased Gangadhar Kashinath Mule's death was homicidal. On 7/11/1997, the accused 1 to 7 at about 2.30 p.m. in front of the house of Ganpat Dhanavade, on the road of Subhash Nagar, Worli,Mumbai, formed an unlawful assembly and with common object and intention, committed the murder of Gangadhar Mule, the husband of the complainant P.W. 1. They had also committed the offence of rioting, with deadly weapons. therefore, they were tried and convicted. The accused No.5, Mohd. Irshad Abbas, Khan was acquitted. These four appeals by the respective appellants-accused, against the order of conviction.

3. The duly linked and proved prosecution story is as under:

. Appellant-accused No.1, Kishor; appellant-accused No.2, Santosh; appellant-accused

No.3, Suryakant; appellant-accused No.4, Ajay; accused No.5, Mohmmad; appellant-accused No.6, Prakash; appellant-accused No.7, Sunil were tried on a common charges. The complainant-P.W.1, Smt. Vaishali, the wife of the deceased, had lodged a complaint in Worli Police station of 6/11/1997. After narrating her background, she had stated that the deceased Gangadhar was arrested in another case by M.M. Joshi Marg police, prior to the date of incident. He was in the jail for about one and half years and thereafter, he was released. She knew the accused Kishor, Pappu, Ajju, Gora Shinde, Santosh, Sunil and Suryakant, as they were resident of same area and were old friends of her husband Gangadhar. In the month of January, 1997, some altercations and quarrel took place between accused No.1 Kishor, Pappu and others on account of carrom. On 6/11/1997, at about 1.30, the deceased husband came to complainant's resident. Both went towards Subhash Nagar to purchase grossary. Accused No.1, Kishor and his associates, who were residing in the same area came from the opposite side. They surrounded the complainant and her husband. Accused No.1, Kishor and accused No.6, Pappu gave push to the complainant. The accused

Surayakant Shinde and Sunil Jadhav caught the complainant. The appellant-accused No.1, Kishor and appellant-accused Gora Shinde, took out Gupties, and the appellant-accused Pappu and Ajju took out choppers, which were in their possession and all those accused started assaulting the deceased. The complainant had tried to intervene to save her husband but she was again pushed aside. In that process, the complainant was also hurt and hit on her hand. The complainant had shouted "save, save". In the mean time husband Gangadhar slummed to the ground in the pool of blood. All the appellants, thereafter, ran away in the direction of Jijatamata Nagar. One chopper, stained with blood remained on the spot. The complainant gave water to her husband and took him to K.E.M. hospital, by hiring a taxi with the help of two boys, P.W.4 Santosh and other. P.W.7, Dr. Vijay Nivrutti Tangaonkar, on duty, had examined the deceased- Gangadhar and declared him dead. An unknown person informed the police, about the incident and had also informed that the injured was taken to K.E.M. hospital. P.I. Jadhav and police Officer, Pimple, P.W. 11 along with the staff therefore, went to K.E.M. Hospital were they found the

dead body of the deceased. The complainant was sitting near the dead body. The police, thereafter, in K.E.M. hospital had recorded the the complainant (Exh.19) and took thumb-impression of the complainant. The inquest panchanama of the dead body was drawn at Exh.36. The blood soaked clothes of the deceased were also seized. The articles 7, 8, 9 and 27 injuries were also noted on the person of the deceased. The complainant along with Jadhav, P.W.11, Pimple and P.W.9 Pathare, went to the spot and drawn spot panchanama Exh.28. The chopper was also found on the spot, (article 10). The F.I.R. Exh.19, was accordingly recorded at the police station. The dead body was sent for the post mortem. The complainant was also sent to Potdar hospital, for the treatment. The Police Officer, Pimple has recorded the statement of P.W. 4 Dinesh and Prakash, in the police Station itself.

4. The appellants-accused 1 to 3 were arrested on 7/11/1997, and their clothes were also seized under the panchanama, Exh.37.

5. On 10/11/1997, appellants-accused 1 to 3 were

interrogated by P.W. 11, Pimple. Based on their volunteered statement, as recorded Exh.26, at the lane, opposite to Kubera Hotel, one gupti from a Bhangar shop was seized vide Exh.26. On 12/11/1997, accused No.4 was arrested. Accused No.5 was arrested on 13/11/1997. The chopper was recovered at the instance of accused No.4, after recording the statement Exh.22 and 22A of accused No.4. On 2/12/1997, accused No. 6 was arrested. Accused No.7 was arrested on 14/12/1997. The supplementary charge-sheet was submitted against accused No.7, in Sessions Case No.155/99, which was merged in Sessions Case No. 173 of 1978, as per the application of the prosecution, as crime was same The charges were framed and the same were denied by the accused and they pleaded not guilty.

6. The prosecution has examined 11 witnesses to prove the prosecution case, based on oral, as well as, documentary evidence on the record. No witness was examined by the appellants-accused. All the accused thereafter, were tried and convicted by the learned Additional Sessions Judge, and therefore, these appeals.

7. Heard the learned advocates appearing for the appellants and A.P.P. for the respondent. We have gone through the testimonies of the prosecution witnesses and the record. The conviction is solely based on one eye witness, complainant Vaishali, the wife of the deceased Gangadhar. There are no other witnesses who have supported the complaint, as well as, the testimony of P.W.1. The corroborative evidence also raises various doubts in the prosecution story, specially when P.W. 2, Tulsiram Kamble, who was the eye witness to the incident has been declared hostile. As per P.W. 1, Vaishali, there was enmity between some of the accused and the deceased-husband. The deceased was convicted and was in jail for one and half years. The complainant knew all the accused, as they are the residents of same locality and area. There is no doubt that the conviction order can be passed, based on the testimony of the sole eye witness but it is always subject to the corroboration by the related and connected evidence to support the prosecution case, specially when the sole eye witness is interested and related to the deceased. Even if, the complainant is interested witness, being the wife of the deceased, that itself cannot be the reason to disbelieve

her case. However, in the present case, her testimony needs scrutiny and due care and cautious, as no other witnesses had supported her complaint or prosecution case. On the contrary, P.W. 2 was declared hostile, P.W. 4 has nowhere supported the prosecution case. In fact, P.W. 4 has destroyed the prosecution case and supported the defence.

8. As narrated, immediately after the incident, P.W.1 with the help of P.W. 4, Dinesh, took the deceased to the K.E.M. Hospital in the taxi. P.W. 4 was sitting on the front seat of the taxi by the side of the driver. P.W. 4 has deposed that the injured was dead when he lifted him from the spot. This witness has further stated in paras 3 and 4 as under

> "The said lady asked me as to who had assaulted her husband. I told her that I did not see the assailants. I asked the said lady as to who had assaulted her husband, on which she told me that one person had informed her about the incident when she was sleeping at home. She further told me that she was not knowing as to who had assaulted her husband."
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> "The said lady did not tell me that accused Kishor, Pappu, Santosh Dhekne, Aju, Gora Shinde and others assaulted her husband, with chopper and gupti."

P.W. 4, Dinesh, has no where stated or deposed that the deceased was alive, when they boarded the taxi. P.W.1 has however, deposed that her husband told her in the taxi to lodge complaint against all the accused. The other person who helped P.W. 1 to take the deceased in the taxi to the hospital, was also not examined. The complainant had never disclosed the name of the accused even to the P.W.4, Dinesh. There was no re-examination and or cross-examination of these witnesses except for accused No.1. This witness has definitely, destroyed the prosecution case and the testimony of P.W.1 the complainant. This testimony of P.W. 4, Dinesh, has nowhere supported the testimony of P.W. 1, except to the fact that the deceased was assaulted and was lying injured on 6/11/1997, at about 2 p.m. and was taken with the help of his wife, the complainant, to the K.E.M. hospital. Para 3 as referred above from the testimony of this witness, further raises doubt about the prosecution case, that the complainant was present at the time of assault and attack. Her testimony that she saw all these appellants who assaulted her husband by suras or gupties has also created doubt. The complainant’s testimony therefore, has also raised a

doubt whether she had actually witnessed the incident or not. The conviction based on sole testimony of P.W.1, in such circumstances, cannot be said to complete link to prove, beyond reasonable doubt, that all the appellants had committed the murder and P.W.1, complainant had witnessed the same.

9. Another aspect which also breaks the link is that, admittedly, the clothes of P.W.1 were not seized or placed on the record, to justify the fact that immediately after the incident, she took her injured husband with the help of the boys to the hospital. P.W. 1, complainant sat on the back seat of the taxi along with the injured-deceased. There were no blood stained clothes, seized, detected or found or placed on the record by the prosecution or the complainant (P.W. 1). We have also noted that there was no seizure of the clothes of the deceased, as well as, of the suras. This mising link has definitely affected the prosecution case. This also raises a doubt whether the complainant was present during or at the relevant time of the incident. Therefore, if the testimony of P.W.1, itself has unable to support the prosecution story beyond

reasonable doubt, then it is difficult to convict the accused, based on the said testimony.

10. As noted above, P.W. 2 who was the alleged eye witness, nowhere supported the prosecution case about the incident of relevant date, and relevant time in question. No independent witness was examined by the prosecution. The incident took place during the day time. As deposed by P.W. 4, there was a crowd near the spot of incident, at the relevant time.

11. It is difficult to maintain the Judgment and order of conviction based on mere recoveries of same articles, specially, when testimony of the alleged eye witness P.W. 1, itself is shaky and raises various doubts about the prosecution case. P.W. 9, P.S.I. Pathare has not supported the prosecution case fully. One witness P.W. 10, Raghunath, P.S.I. even though name was dropped by the prosecution. Therefore, recovery of the chopper, article 1, through the panch witness P.W.3, cannot be said to be the proper recovery to rely upon and or to convict the appellants. The knife was also recovered, near the scrap shop, from the

ditch.

12. The contradictions and omissions therefore, in the evidence of these witnesses, especially P.W. 1,2, and 4, also raise doubts in reference to the involvement of these accused. P.W. 2, the alleged eye witness was turned hostile and not identified any of the accused before the Court. P.W. 4 Dinesh has also not supported the prosecution story and therefore, the cumulative effect of this is that the testimonies of these evidences cannot be relied and cannot be the foundation to convict the appellants. No identification parade was held in respect of any of the accused. No blood stains were found on the clothes of appellant accused Nos. 3 and 4. No other witnesses, except P.W. 1 has identified the accused and or supported the prosecution case to prove that they were present on the spot at the relevant time and they had actually assaulted the deceased. The learned Counsel appearing for the appellant, in above background and in support of his submissions, relied on A.I.R. 1994 S.C. 1683, Jaising Waman Patil V. State of Maharashtra, wherein the Apex Court has held that the testimony of the deceased's

wife, an eye witness, is unreliable, if not corroborated by any other witnesses. In that case the said eye witness did not tell anything to implicate the accused to the Police Patil, who came immediately after the occurrence. There were other infirmities also, and therefore, the Apex Court had acquitted the accused. In the present case, the sole testimony of the complainant, the wife of the deceased, has been relied by the learned Sessions Judge and passed the order of conviction. As we have gone through the testimonies of other witnesses, we see that there are lacunas and substantial contradictions, which have destroyed the prosecution's case, based on the evidence of P.W.1, P.W. 2 and P.W. 4, the independent witnesses have nowhere supported the prosecution case, as well as, the testimony of the P.W.1. The conviction therefore,based on such sole eye witness in the present case, is also unsustainable.

13. P.W. 1 has deposed that there was enmity between the accused persons and the deceased Gangadhar and therefore, there was motive to kill the deceased. The enmity between the parties is always a double edged weapon, in such cases, there is a possibility of false

involvement or false implications by the concerned parties.

13. The non examination of the independent witnesses, from the locality to support the oral testimony of P.W.1, has also discredited her oral evidence.

15. P.W. 5 has also not identified the accused No.1, Kishor before the Court and wrongly identified the accused Surayakant Shinde, at whose instance articles, 3 and 4 were recovered by the police. This also contradicts a statement of P.W.11, Police Officer, Pimple, about the voluntary disclosure by the accused No.1. The prosecution has also not made attempt to analyse the blood groups of the appellants- accused.

16. Therefore, for the reasons recorded above, according to us, prosecution has failed to prove beyond reasonable doubt, that the appellants have committed the offence in question. We are of the view that the

learned Sessions Judge was wrong in convicting the accused based on the testimony of the sole eye witness. The other non supportive witnesses have raised doubts and broken the various links and in fact destroyed and/or shattered the prosecution case on material evidence.

17. In view of this, the impugned judgment and order dated 27 and 28th September, 1999 is quashed and set aside. There is a merit in the appeal. All the appellants are acquitted from the respective offences, as charged and convicted. They be released forthwith, if not needed for any other offence.

18. The appeals are allowed.

[V.G. PALSHIKAR, J.]

[ANOOP V. MOHTA, J.]